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BY ELECTRONIC DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: *Ex Parte Presentation*, Review of the Section 251
Unbundling Obligations of Incumbent Local Exchange
Carriers, CC Docket Nos. 01-338, 96-98, 98-147

Dear Ms. Dortch:

In recent submissions, the Bell Operating Companies ("BOCs") have argued that, if the Commission concluded that an incumbent local exchange carrier ("LEC") were no longer required to provide access to a particular network element on an unbundled basis, incumbent LECs would no longer be required to file agreements that they negotiate with competitive LECs governing access to those elements.¹ Under this view of the Communications Act of 1934, as amended ("Act"), incumbent LECs also would not be required to make such negotiated agreements available to competitive LECs pursuant to Section 252(i) of the Act.² The BOCs further claim that the Commission's recent ruling in the *Qwest Order* supports this conclusion.³ Contrary to the BOCs' claims, the plain

¹ See generally *Ex Parte* Letter from Dee May, Verizon, to Marlene H. Dortch, FCC (Jan. 17, 2003) ("Verizon Letter"); *Ex Parte* Letter from Michael K. Kellogg, on behalf of SBC, BellSouth, and Qwest, to Marlene H. Dortch, FCC (Jan. 21, 2003) ("BOC Letter"). The BOCs have further argued that the FCC should eliminate its existing pick and choose rule entirely. Those claims have been thoroughly refuted elsewhere in the record. See generally *Ex Parte* Letter from Joan Marsh, AT&T, to Marlene Dortch, FCC (Jan. 29, 2003). (All *ex parte* submissions referenced herein were filed in CC Docket No. 01-338.)

² See Verizon Letter at 2; BOC Letter at 6.

³ See *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, 17 FCC Rcd 19337 (2002) ("*Qwest Order*").

language of the Act confirms that voluntarily negotiated interconnection agreements, including those containing network elements not required by the Commission's rules, are subject to Section 252(e)'s state filing and approval requirements, and, in turn, Section 252(i)'s availability obligation.

The requirements imposed by Section 252(i) apply to any agreement approved by a state commission under Section 252, whether arbitrated or negotiated.⁴ An incumbent LEC's obligation to file negotiated agreements for approval under Section 252 is governed by Section 252(a). That section provides that "[u]pon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent [LEC] may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251."⁵

Clearly, incumbent LECs are required to file agreements that contain provisions governing access to network elements that the FCC requires incumbents to unbundle, although the agreement may also contain provisions relating to interconnection and access that are not covered by the FCC's rules.⁶

Moreover, the BOCs' claim that they are not required to file agreements that relate solely to interconnection and access to network elements not covered by the FCC's rules ignores the plain language of Section 252(a). Section 252(a) by its terms applies to any agreement between incumbent LECs and competitive LECs concerning interconnection or access to network elements "without regard to the standards set forth in subsections (b) and (c)" or, obviously, the FCC's rules implementing those provisions.

⁴ 47 C.F.R. § 51.809(a); 47 U.S.C. § 252(e)(1).

⁵ 47 U.S.C. § 252(a); *see also Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 763-764 (8th Cir. 2000) ("[Section 252(a)] begins by making reference to a competitor's 'request . . . pursuant to section 251.' Upon receiving such a request, the competitor and the ILEC 'may negotiate and enter into a binding agreement' without regard for the interconnection and unbundled network element access standards of § 251(b) and (c)."), *reversed on other grounds, Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002).

⁶ *See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 244 n.523 (1996) (parties to voluntary negotiations under Section 252 "can agree to provide unbundled network elements that differ from those identified by the Commission"); *Global NAPs, Inc. v. Verizon Communications*, 17 FCC Rcd 4031, ¶ 15 (2002) (noting Verizon's stipulation that "its interconnection agreements in the former Bell Atlantic territory 'typically contain terms in addition to those listed in 47 U.S.C. § 251(c)(1)-(6)'"'). *See also id.* ¶ 12 ("The fact that the agreement included other provisions does not take it out of the ambit of section 251(c).").

In other words, Section 252(a) clearly covers agreements containing provisions relating to interconnection and access to network elements that incumbents are not required by the state or the FCC's rules to offer to competitive LECs. Section 252(e)(1) requires carriers to submit those negotiated agreements to state commissions for approval and, after approval, Section 252(i) in turn obligates incumbent LECs to make the provisions of such agreements available to competitive LECs.

The Commission's recent ruling in the *Qwest Order* is not to the contrary. There, the Commission refused to adopt Qwest's request for a sweeping ruling that Section 252(a) did not cover agreements relating to access to "network elements that have been removed from the national list of elements subject to mandatory unbundling."⁷ Instead, the Commission simply concluded that state commissions have the responsibility for determining "whether a particular agreement is required to be filed as an 'interconnection agreement.'"⁸

In sum, incumbent LECs must continue to file negotiated interconnection agreements with the state commission for approval, including those agreements that relate to access to network elements that incumbent LECs are not required to make available on an unbundled basis. Once approved, incumbent LECs are obligated by Section 252(i) to make the provisions of such agreements available to competitive LECs under the FCC's pick-and-choose rule.

Sincerely,

/s/ A. Richard Metzger, Jr.
A. Richard Metzger, Jr.

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⁷ *Qwest Order* ¶ 3.

⁸ *Id.* ¶¶ 9-11.